Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1795

KURT R. STRAUBE, M.D.,

Petitioner,

v.

ROGER. G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital,

Respondents.

KURT R. STRAUBE, M.D.,

Petitioner,

v.

ROGER G. LARSON, JOHN C. ENGLISH, M.D., ROBERT SEAPY, M.D., RICHARD K. HELM, M.D., FIRST JOHN DOE, SECOND JOHN DOE, ETC., TO AND INCLUDING TWENTIETH JOHN DOE, FIRST JANE DOE, SECOND JANE DOE, ETC., TO AND INCLUDING TWENTIETH JANE DOE, FIRST DOE, M.D., SECOND DOE, M.D., TO AND INCLUDING FIFTIETH DOE, M.D.,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES

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The Ninth Circuit interpretation of the phrase "...color of any statute, ordinance, regulation, custom or usage, of any state or territory, ..." as found in 42 U.S.C. Section 1983 was in direct accord with the applicable decisions of this court and any remaining conflict between the circuits on the meaning of said phrase when applied in the general context of the instant case offers no far-reaching consequences justifying consideration by this Court.

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QUESTIONS PRESENTED FOR REVIEW

Petitioner's misunderstanding of this case commences with his misapprehension of the question presented to this Court and permeates his entire petition for certiorari.

Petitioner asks whether respondent-Emanuel's receipt of state and federal aid in various alleged forms constitutes state action under 42 U.S.C. § 1983. The actual question presented is whether there is any nexus or connection between Emanuel Hospital's receipt of governmental aid and the dismissal of petitioner from hospital staff privileges at Emanuel Hospital. A reasonable statement of the issue presented is:

> Absent any actual or alleged nexus between a private nonprofit hospital's receipt of public support and the suspension of petitioner from staff privileges at the hospital, did the lower court error in finding insufficient "state action" to support petitioner's claims under 42 U.S.C. § 1983?

STATEMENT OF THE CASE

Petitioner's statement of the case is a fair summation of the procedural history of this litigation. It is noteworthy, however, that petitioner has nowhere alleged in his complaints that any of the various forms of state aid to Emanuel Hospital were conditioned upon or in any way connected with petitioner's dismissal from hospital staff privileges at Emanuel Hospital.

REASONS FOR DENYING THE WRIT

Petitioner has exaggerated any existing conflict between the decisions of the circuit courts on the question presented. Further, this court recently denied a petition for certiorari which presented the precise issue. Greco v. Orange Memorial Hospital Corporation, 513 F.2d 873 (5th Cir. 1975), cert. den., ____ U.S. ____, 96 S. Ct. 433, 46 L. Ed.2d 376 (1975).

Prior to 1972, the circuit courts rendered numerous decisions under 42 U.S.C. § 1983. These pre-1972 decisions demonstrated some doubt on the question of what quantum of involvement had to exist between an essentially private institution and the state before the essentially private institution became subject to the substantive requirements of 42 U.S.C. § 1983.

In 1972, this Court decided the case of Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965, 32 L. Ed.2d 627 (1972). Moose Lodge, supra, presented the claim of a guest of a member of a private club who had been refused service because of his race. Relying on the fact that a liquor license had been issued to the lodge under the provisions of Pennsylvania law, plaintiff asserted that the lodge was subject to the restrictions imposed by the United

States Constitution against discriminatory "state action". This Court held that governmental contacts with an essentially private institution were insufficient to impose the constitutional restrictions against discriminatory "state action" where such contacts were not so pervasive as to make that institution lose its essentially private character. As this Court stated:

> "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise. ... ." (407 U.S. at pp. 176-177).

Following the Moose Lodge, supra, decision, claims of a very similar nature to those presented by petitioner here have been advanced in the various circuit courts. In particular, the United States Courts of Appeals for the Second, Fifth, Seventh,

Ninth and Tenth Circuits have been presented with similar claims. In each instance, these circuit courts have held that the receipt of such state aid as Hill-Burton funds, tax advantages or other incidental governmental contacts are not sufficient to clothe an essentially nonprofit hospital with "state action", given the absence of any connection or nexus between the governmental contacts and the alleged wrongs done to the plaintiffs there involved. Barrett v. United Hospital, 376 F. Supp. 791 (S.D. N.Y. 1974), aff'd. 506 F.2d 1395 (2d Cir. 1975); Greco v. Orange Memorial Hospital Corporation, supra; Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973); Ascherman v. Presbyterian Hosp. of Pac. Med. C., Inc., 507 F.2d 1103 (9th Cir. 1974); Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

As to the petitioner's assertion that there is a conflict between the decisions within the Courts of Appeals for the Sixth, Eighth and Tenth Circuits (Petition, pp. 9-10), a review of the decisions cited by petitioner in support of these claims demonstrates the abject lack of validity to these assertions.

As to the Eighth Circuit, petitioner cites the decision of Klinge v. Lutheran Charities Ass'n of St. Louis, 523 F.2d 56 (8th Cir. 1975). Petitioner asserts that the court "...did not question and appeared to acknowledge that where a defendant non-profit private hospital had participated substantially in the receipt of federal funds and had substantial contract relations with the state and city governments, it was subject to federal constitutional limitations. ... ." (Petition, p. 8).

The decision in Klinge, supra, provides no basis to support petitioner's

interpretation. In Klinge, supra, 523 F.2d at p. 60, the court made particular note of the fact that:

> "... . No claim is made that the action of the Hospital's Board of Directors in removing plaintiff from the staff was not state action which would give the court jurisdiction under 28 U.S.C. § 1343(3) read in connection with 42 U.S.C. § 1983."

Accordingly, the court did not consider the question and, therefore, no reasonable assertion can be made that there is any internal conflict between the decisions of the Eighth Circuit.

Petitioner's assertion that there is a split within the decisions of the Sixth Circuit is even more strained. Following the decision in Moose Lodge, supra, the Sixth Circuit rendered the decision in Jackson v. Norton-Children's Hospitals, Inc., 487 F.2d 502 (6th Cir. 1973), its most recent on the question. There, the

Sixth Circuit held that the receipt of Hill-Burton funds was not sufficient, in and of itself, to make the conduct of a private hospital "state action."

As to the Tenth Circuit, and any alleged conflict between the decisions of that court, petitioner cites a 1971 decision, Don v. Okmulgee Memorial Hospital, 443 F.2d 234 (10th Cir. 1971), and compares that decision to Ward v. St. Anthony Hospital, supra, (Petition p. 8). There is no conflict between these decisions. In Don, supra, the court was not required to focus on the question presented here, giving the matter only the most cursory treatment. However, in Ward, supra, the court squarely considered the issue and held that because there was no nexus between the governmental contacts alleged and the medical staff decisions of St.

Anthony Hospital, there was no "state action" as required by 42 U.S.C. § 1983.

These recent decisions in the Sixth, Eighth and Tenth Circuits which have followed pronouncements of Moose Lodge, supra, leave only one case among the circuit courts which reasonably can be said to support petitioner's contention that there is a conflict between the circuits on the question presented here. This case is Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974). That is, Duffield, supra, stands as the only decision in any of the circuit courts which has been rendered after Moose Lodge, supra, that would support the contention that the receipt of Hill-Burton funds or other such incidental governmental aid to an essentially private hospital is sufficient to clothe the institution's conduct with state action under 42 U.S.C. § 1983. The explanation for this disparity between

Duffield, supra, and the overwhelming number of decisions to the contrary may well be found in the fact that the small portion of Duffield, supra, which considered the instant question made no mention of this court's decisions on the matter or of the nexus requirement set forth in Moose Lodge, supra.

Further, the Duffield, supra, case was rendered before this Court denied a petition for certiorari raising the same issue as that presented here. Greco v. Orange Memorial Hospital Corporation, supra. No reasonable argument is presented by petitioner to buttress a claim that reasons now exist for granting certiorari which did not exist when this Court so recently considered and denied a petition raising the issue.

CONCLUSION

There is no serious conflict between the circuit courts on the question presented. Except for a single aberration the rule among the circuits is clear. They apply the principles of Moose Lodge, supra, and dismiss 42 U.S.C. § 1983 claims under circumstances such as those presented here. Given the fact that the split among the circuits is minimal and is moving toward resolution, there is no compelling need for this Court to grant petitioner's petition for a writ of certiorari.

Respectfully submitted,

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